IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 140 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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CHAUHAN SHAUKATALI MOGALKHAN

Versus

SUB DIVISIONAL MAGISTRATE

Appearance:

1. Special Criminal Application No. 140 of 2001

MR PRAVIN GONDALIYA for Petitioner

MR HL JANI, Learned APP for Respondents

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 20/07/2001

ORAL JUDGEMENT

1. Heard Mr.P.S.Gondaliya, learned advocate appearing on behalf of the petitioner and Mr.H.L.jani, learned APP appearing on behalf of the respondents.

2. In the present petition, the order of externment dated 31/7/2000 passed by the Sub-Divisional Magistrate, Mehsana as well as the order dated 9/1/2001 passed by the Appellate Authority are challenged by the petitioner under Article 226 of the Constitution of India.

3. Mr.P.S.Gondaliya, learned advocate for the petitioner has submitted that the show cause notice has been issued by the Sub-Divisional Magistrate, Mehsana on 22/6/2000 under Section 59 relying upon the provisions of Section 57(c) of the Bombay Police Act, 1951 (hereinafter be referred to as "the Act"). Mr.Gondaliya has also submitted that the Criminal Cases, which have been referred in the show cause notice including one chapter case all are pending against the present petitioner and the petitioner has not been convicted in any of the cases, which are referred to in the show cause notice. Mr.Gondaliya has also submitted that Section 57 (c) of the Act relates to taking into account the cases, wherein the conviction has been made against the concerned Externee. But in the facts of the petitioner's case, there was no conviction in respect to the cases, which are referred to in the show cause notice and, therefore, relying upon the provisions of Section 57(c) of the Act itself, it is non-application of mind by the concerned Authority. Mr.Gondaliya has also submitted that all 4 cases which have been referred to including chapter Case, are pending against the present petitioner and no conviction has been declared by the Competent Court. Mr.Gondaliya has raised another contention that the statements of the secret witnesses, though recorded prior to the show cause notice, have not been disclosed by the concerned Authority in the show cause notice. Therefore, the material, which is adverse to the petitioner is suppressed and not disclosed by the concerned Authority. Mr.Gondaliya has also submitted that the statements of the secret witnesses have been considered by the Appellate Authority also. In this connection, he has relied upon the decision of the Division Bench of this Court in the case of Aswin Chandulal Jaiswal v/s. Deputy Commissioner of Police, Vadodara & Another, reported in 1990 (1) G.L.H. 314. Mr.Gondaliya has also submitted that the specific contentions have been raised by the petitioner in ground (F) at page-7 of the petition.

4. Mr.H.L.Jani, learned APP for the respondents has submitted that no any reply has been filed by the respondent - Authority. According to him, looking to the offences, which have been registered against the present petitioner, there were compelling circumstances to pass an externment order against the present petitioner and, therefore, the concerned authority has rightly passed the externment order, which is legal and valid and, therefore, no interference is required by this Court.

5. I have considered the submissions of both the learned advocates. Looking to the facts of the present

case, in the show cause notice, the offences which are enumerated by the concerned Authority, that all are pending before the trial and non of the case, the petitioner was convicted, and therefore, Section 57 (c) of the Act is not applicable at all. However, the show cause notice has been issued by the concerned authority keeping in mind the relevant provision of Section 57(c) of the Act. Therefore, the show cause notice itself is amount to a result of non-application of mind, as no reply filed by the respondent - authority. It is also necessary to note that the statement of the secret witnesses which have been taken into account by the concerned Authority, at the time of passing the externment order and said facts have not been disclosed to the petitioner in the show cause notice and no material has been supply to the petitioner along with the show cause notice which is adverse to the petitioner. Therefore, the real purpose of Section 59 of the Act to give effective and reasonable opportunity to the petitioner in respect to the material which has been adverse to the petitioner is frustrated.

6. In light of this factual aspect and legal consideration of the provision of Sub-Clause (1) of Section 59 of the Act which is relevant to the facts of the present case, are quoted as under :-

"59. Hearing to be given before order under Sections 55, 56 or 57 is passed :-

(1) before an order under Section 55, 56 or 57 is passed against any person the officer acting under any of the said sections or any officer above the rank of an Inspector authorized by that officer shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them. If such person makes an application for the examination of any witness produced by him, the authority or officer concerned shall grant such application; and examine such witness, unless for reasons to be recorded in writing, the authority or officer is of opinion that such application is made for the purpose of vexation or delay. Any written statement put in by such person shall be filed with the record of the case. Such person shall be entitled to appear before the officer proceeding under this section by an advocate or attorney for the purpose of tendering his explanation and examining witnesses

produced by him.

(2) -----"

7. While reading sub section referred to above, it is important to note that it is the duty of the respondent No.1 to give reasonable opportunity to the petitioner before passing the externment order against the petitioner. The language which has been used in a particular section is provided that the officer shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them. Therefore, this is a reasonable opportunity of tendering explanation given by the petitioner which requires to be satisfied before passing the externment order against the present petitioner.

8. In the present case, there is no dispute on record that in show cause notice, no such material is referred by the respondent no.1 that statement of the secret witnesses were recorded and obtained by the concerned authority. This fact has not been disclosed in the show cause notice which has been served to the petitioner. In light of this undisputed fact, the view taken by the Division Bench of this Court in the case of Rambhai Khimchand v/s. State of Gujarat, reported in 1990 (2) G.L.H. 617, this Court has made observations in para-(9) are as under :-

"9. As far as the present case is concerned, it cannot be said that unsubstantial or non existent ground has been taken into consideration, but a ground which is germane for the purpose of externing a particular person has been taken into consideration by the externing authority without putting the externee on notice as regards that ground. If that be so, the Court cannot substitute objective judicial test for the subjective satisfaction of the executive authority and come to the conclusion that the executive authority, dehors the said ground which has not been put on notice to the externee was able to arrive at a decision for the purpose of externing the person concerned in that particular case. Thus, it is clear that reference to a particular instance such as persons of status and means have shifted from the locality so that they may not become the victim of such tort committed by the petitioner herein is a clear instance to show that the activities of the petitioner

concerned have reached that degree or harm to the society that the interest of the society or even of that particular locality required that this individual who has become a publici menace should be externed from the locality. This particular instance has not been put on notice to the externee though it finds place in the externment order. natural justice requires that the person affected should have notice of the relevant materials on which the authority concerned bases its conclusion. The fact that the person with status and means have shiftedfrom their place so that they may not become victim of such torts by the externee concerned is one of the essential and relevant circumstance of externing a person. This essential circumstance on which the externing authority relied was not put on notice to the externee. As we have stated already this circumstance finds place in the order of externment. The failure on the part of the externing authority to put on notice to the externee regarding this particular circumstance, in our opinion, clearly vitiates the order of externment and offers the principle of fair play and justice. For all these reasons the order of externment is quashed and set aside. Rule is made absolute."

In a decision rendered by the Bombay High Court in case of Mehmood Babu Kawal @ Dawarya Shaikh v/s. Assistant Commissioner of Police, City Station, Pune, reported in 1991, Cr.L.R. (Mah.) 359, wherein The Bombay High Court has made following relevant observations ;

"2. With the Assistance of the learned counsel of both the parties, we have gone through the show cause notice dated 9th January, 1990 issued under Section 56-B of the Bombay Police Act as well as the Order of Externment passed under Section 56 of the said Act. On perusal of the show cause notice and the order of externment, we find that the order of externment specifically catalogues three criminal cases under Prohibition Act registered and pending against the Externee. The said cases were not referred to at all in the show cause notice. A perusal of the impugned order further shows that the Externing Authority has in fact taken into consideration the fact that the petitioner deals in the sale of liquor and has been involved in offences under the Prohibition Act which is clear

from his satisfaction recorded below the catalogue. He has stated that after considering the entire evidence place before him and the reply advanced, he is satisfied that the proposed externee deserves to be externed. it is thus apparent that material extraneous to the show cause notice was taken into consideration at the time of passing of the order of Externment and therefore, the order of externment is vitiated having been passed against the principles of natural justice. On this ground alone, the impugned order is liable to be set aside. We further find that in the show cause notice about 5 incidents of criminal acts of the proposed externee were cited but the date and the time of the incidents had been mentioned without reference to the locality where the alleged incident had taken place. A general nature of material particulars is necessary to be given to the proposed Externee so as to offer him adequate opportunity to show cause against the allegations. In the instant case, since various localities of Pune City are allegedly affected by the prejudicial activities of the proposed externee, it was necessary to give general particulars of the area where the alleged incidents had taken place. For all these reasons, stated above, we find that the order of externment is vitiated and has to be set aside."

In one more decision rendered by this Court in case of Aswin Chandulal Jaishwal Vs. The Deputy Commissioner of Police, Vadodara City, reported in 1989 Cr.L.R. (Gujarat) 517, wherein this Court has in para-(9) made following relevant observations :-

"9. Shri has also stated in his affidavit that the Inspect, Police Station, Vadodara, had recorded statements of 11 persons in confidence. he further stated that he had applied mind on the relevant material of the case produced before him, which includes the statement of the persons recorded by the police. It is not stated that in the notice that the statements of the witnesses were recorded by the police. If at all any such statements would have been recorded and intended to be relied upon, such statements would have been recorded and intended to be relied upon, at least, reference of the statements, without disclosing the names, with the time and place of such alleged illegal activities of the petitioner

> should have been made in the notice so that the petitioner could have got an opportunity to explain the said circumstances or lead evidence. Without giving him an opportunity or even letting the petitioner know that statements were recorded, the Deputy Commissioner of Police has relied on statements of 11 persons. It is true that general allegations are only required to be made in the notice, but when statements are relied upon for the externment order at least, the person to be affected by such order should be given an opportunity to explain at least the general nature of allegations in the statements. The petitioner was, therefore, deprived of the opportunity to explain the circumstances, which weighed considerably with the Externing Authority and, therefore, also the order vitiates."

9. I have considered the observations made by the Division Bench of this Court as well as the Bombay High Court. The material question is that before passing the externment order, show cause notice is necessary and the same has been considered to be as mandatory then it is the duty of the respondent No.1 to give effective and reasonable opportunity to the petitioner referring all the materials taken into consideration by the respondent No.1. If any material is left out and not disclosed in the show cause notice and the same is considered in the externment order, then it amounts to not giving an effective and reasonable opportunity for tendering explanation against the show cause notice and the real purpose an object of Section 59(1) as enacted by the Legislature will be frustrated. if any material which has been taken into account by the respondent No.1 while passing the externment order, in that case, it ought to have been disclosed to the petitioner in the show cause notice so that the petitioner can effectively represent his case against the adverse material which has been collected and considered by the respondent No.1. Therefore, according to my opinion, the respondent No.1 has not given an effective reasonable opportunity to the petitioner and the order of externment which has been passed by the respondent No.1 against the petitioner is in fact passed in violation of principles of natural justice and, therefore, the order of externment 31/7/2000 and the order of the appellate authority dated 9/1/2001 deserve to be quashed and set aside.

10. In the result, the present petition is allowed. The order of externment passed against the present petitioner dated 31/7/2000 and the order passed by the

appellate authority dated 9/1/2001 are hereby quashed and set aside. Rule is made absolute accordingly.

(H.K.Rathod,J.)

(vrpanchal)**